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AMENDING AND INTERPRETING THE PEACE TREATY IN THE ACT OF RATIFICATION.

The tendency of the discussion of the Versailles Peace Treaty the last two weeks has been to remove the whole controversy from the atmosphere of politics to that of jurisprudence and real statesmanship.

It is agreed that there is a logical and insistent demand for a world organization to insure a stable peace, to protect the new nations created by the treaty, to supervise the proper execution of the duties of the commissions, boards and mandatories appointed under the authority of the treaty and ultimately to formulate and codify the common law of nations with a view of correcting and removing the conditions that make war possible and conducing to a more permanent peace.

It is proper that necessary safeguards shall be set up to prevent any misconceptions concerning the powers of the League of Nations and the high contracting parties should be encouraged to announce in advance their "construction" of the extent of the important obligations which they assume toward one another when they enter the pending compact. If such declarations are in the form of interpretations, they cannot be offensive to any other nation and will disclose at once if there is any serious disagreement between the allies as to any material provisions of the covenant, a consideration of considerable importance.

With the nature of these reservations we are not concerned at the present time. In a general way they will probably call attention first to the peculiar limitations of our Constitution, which cannot be affected by any treaty provisions; they will, no doubt, define more clearly what we mean by the Monroe Doctrine and will probably construe the full extent of the word "advise" in Article X so that there may be no compulsion from any outside authority which would attempt by the power thus granted to coerce Congress into a war against its will. It will be seen, however, that any reservations of this kind are in reality mere interpretations of specific provisions of the treaty.

While, strictly speaking, it is not within the power of the Senate actually to amend a treaty, there can be no doubt of its power to "condition" its ratification thereof on certain additions or emendations being made. The Senate's power to advise as well as to consent, justifies the Senate in withholding its consent while at the same time advising the President to continue the negotiations for the purpose of securing some desired change or some additional stipulation.

In one of the first treaties negotiated by Congress—the Jay treaty, signed November 19, 1794—the Senate, which had not been previously consulted respecting the terms of the treaty, as had been the practice under the Confederation, considered a motion to postpone consideration of the treaty until an objectionable article (XII) relating to trade between the United States and the West Indies had been eliminated. On June 24, 1795, however, the Senate passed a motion "advising and consenting to" the ratification of the treaty "on condition" that an article be added to the treaty whereby "it should be agreed to suspend the operation of so much of the twelfth article as related to the trade between the United States and the British West Indies." The change was made and the treaty ratified without again submitting the treaty to the Senate. On the question of resubmission, it might be added in passing, there was some argument, Alexander

Hamilton contending that the treaty should have been resubmitted to determine whether the amendment was in conformity with the Senate's view. The President on advice of the Secretary of State insisted that the Senate had acted conditionally and that it was for the Supreme Court to say whether or not the President had substantially complied with the condition imposed by the Senate.

There has been considerable discussion of the practical difference between amendments, reservations and interpretations. In all the discussions that have come to the attention of the writer, the assumption is made that the Senate has the power to change a treaty or reopen negotiations and then finally to conclude a treaty satisfactory to itself. This is clearly erroneous. The Senate's power is only to advise and consent. Strictly speaking the Senate cannot even "ratify" a treaty but merely "consents" to its ratification. The President alone is given the power to negotiate and to ratify a treaty. Of course he may not exchange ratifications with a foreign power without the "consent" of the Senate. If he attempted to do so the Supreme Court would hold the treaty to have no effect. On the other hand, the consent of the Senate to the ratification of a treaty does not put it into effect and the President, after such consent is given, may refuse to proceed further in the matter. For these reasons there is a considerable difference between so-called amendments and reservations. The only way that the Senate can effectually bind the President is by attaching "conditions" to its consent to a ratification of a treaty. A reservation or an interpretation, while having some effect, as we shall see later, in reality does not bind the President, who may promptly exchange ratifications after simply stating the views of the Senate with reference to certain provisions of the treaty. When, however, the Senate consents to a ratification only upon condition that certain changes shall be made in the treaty itself, the effect is to compel the President to reopen negotiations with a view to secure the amendment before he is competent to exchange ratifications.

Interpretations, unless made conditional by requiring the assent thereto by the other high contracting parties, will not, as we have said before, prevent the President from ratifying the treaty. The value, however, of such interpretations properly recorded and brought to the attention of the other high contracting parties will appear when some controversy arises over a section of the treaty to which such "interpretations" apply. A treaty is a contract, and like any other contract, its application must be construed either by agreement of the parties themselves or by arbitrators selected by them. The courts of the several high contracting parties will not attempt the useless task of construction. (Doe v. Braden, 16 How. 635, 657). The result is that such reservations are and must necessarily be relied upon by the executive departments of the several high contracting parties when they come to insist, on some future occasion, upon what they may regard as the nation's rights under the treaty; or, if a tribunal is set up by the treaty itself, authorized to determine disputes arising thereunder, such tribunal will undoubtedly take into consideration such "interpretations" in considering the intention of the parties in the use of any ambiguous words, phrases or clauses in the treaty which may be the subject of contention.

The peculiar advantage or, looked at from another aspect, disadvantage, of the covenant for a League of Nations is that when it is once constituted, the construction of the intent of the high contracting parties is transferred at once to a quasi-

judicial body already constituted, whose decisions will be absolutely binding on the nations adhering to the covenant. In the process of time there is no doubt that there will be constituted an international judicial tribunal to which the nations may resort as individuals do today, for the determination of disputes with other nations. With this court as with any other court, declarations made by any of the high contracting parties at the time when the treaty is signed, will be regarded as having great weight in determining the meaning of such words or phrases.

In 1850 the United States made a treaty with Great Britain in which it was provided that "neither party would ever occupy, or fortify, or colonize, or assume any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America." After the Senate's consent to ratification had been given, the American and English negotiators signed and filed a memorandum of "interpretation," to the effect that the provision quoted was not "understood by the contracting states, nor by themselves, to include the British settlement at Honduras and adjacent islands." Although the filing of this memorandum provoked much adverse criticism in the Senate, it was subsequently held by the State Department that such a declaration on the part of the negotiators could not be "overlooked" in arriving at a proper construction of the terms of the treaty. If that be true with respect to an unauthorized declaration of negotiators, how much more effective for purposes of construction would be the formal "interpretations" adopted by the Senate when consenting to ratification and declared by the President on the occasion of the exchange of ratifications.

Whether amendments are necessary to make the treaty acceptable to the Senate or to the people of the United States will more clearly appear in the debate on the various sections as they are presented for consideration. If certain changes in the treaty are regarded as vital, the question will then be whether they are so important as to require the reopening of negotiations by making the consent of the Senate to a ratification of the treaty "conditional" on certain definite verbal changes being made in the Treaty itself, or whether the Senate will be satisfied with requiring the President simply to declare what construction the United States places upon certain apparently ambiguous provisions of the Treaty.

NOTES OF IMPORTANT DECISIONS.

WHAT CHARACTER OF ERROR GIVES BASIS FOR A NEW TRIAL?—A new viewpoint from which to regard the much debated question of "technicalities" in the law is given in the opinion of the court in the recent case of Brewer v. Ring, 99 S. E. Rep. 358. Heretofore it has been contended that all error is reversible, and that for any error committed it was the duty of the Appellate Court to reverse the judgment, in order to give proper sanction to the rule of evidence or procedure which the trial court deliberately violated or ignored. In the Ring case, the Supreme Court of North Carolina contends that the basis of appellate jurisdiction is not the correction of errors but to grant relief from injustice committed by the trial court. On this point the court said:

"Courts do not lightly grant reversals or set aside verdicts upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice (Hilliard on New Trials, 2d ed., secs. 1 to 7). The motion should be meritorious and not based upon merely trivial errors, committed, manifestly, without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have long ceased to have that effect and have become obsolete."

This principle of the proper basis of appellate jurisdiction is well stated in 3 Graham & Waterman on New Trials, 1235, where the au-

thors say that "the foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely." And in New York the same rule is enforced. In Post v. Railway Co., 95 N. Y. 62, the court declared: "Under our system of appeals every error does not require a new trial, for the vast judicial work of the state could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice it should be disregarded, for undue delay is a denial of justice."

The idea that a court of appeal is a mere examining board to correct the answers to questions of evidence and procedure often unintelligently and sometimes unsympathetically hurled at a trial judge who is required to answer them on the spur of the moment, is a conception that must soon depart with other crude ideas of common law procedure. The Appellate Court is a court of justice and it should appear that if an error (a wrong) has been committed, such error has also worked damage to the complainant. Rules of pleading, evidence and procedure comprise the great body of secondary rights. Those rights, it is true, are just as important as primary rights, for they make possible the enforcement of such rights. But a violation of a primary right resulting in no damages affords no basis for a substantial judgment. Since an Appellate Court has no way of giving a judgment which is at all comparable in effect to a judgment for nominal damages, it is reasonable that they should require proof of damage or injustice done to appellant by reason of the errors committed by the trial court.

CAN ONE SUFFER MENTAL ANGUISH BY REASON OF NOT RECEIVING A TELEGRAM?—While for every wrong there is said to be a remedy, yet every wrong does not always result in the effective application of such remedy. A defendant may breach a contract, but if he can show that no damages resulted, the effectiveness of the plaintiff's remedy is destroyed. True, a judgment for nominal damages may be given to plaintiff in recognition of the technical injury he has suffered, but in the language of one court "they are a mere peg to hang costs on." 59 Conn. 272, 22 Atl. 300.

If a telegraph company fails to deliver to me a telegram a technical injury has been done to me. If I am worrying over an accident to a relative a thousand miles removed, and a telegram announcing that the accident is not serious is not delivered to me, the telegraph company is liable for the mental anguish which I have suffered in the meantime. But if I reverse the character of the telegram, and, while in the sweet assurance that all is well at home, I fail to get a telegram announcing the serious illness of my wife and later arrive at home after she is out of danger, have I suffered any mental anguish by reason of the non-delivery of the telegram? Under a recent decision of the Supreme Court of Mississippi, the company for so considerately keeping from I have not, but on the contrary, ought to thank me a telegram that would have created the keenest anxiety. Postal Telegraph Co. v. Kennedy, 81 So. Rep. 644.

In this case the appellee Kennedy was away from his home at Gulfport, Miss., working in a shipyard at Mobile. Knowing that his wife expected soon to become a mother, he did not, however, anticipate any complication. On giving birth to four children, the wife's condition became serious and alarmed her friends, who sent a telegram to the husband in these words: "Agnes very sick. Doctor at bedside." Because of the negligence of the telegraph company this message was never delivered. The following day another message asking him to come home was received. On his arrival, the four children had been delivered, all of whom died a short time after birth, and his wife was pronounced by the doctor to be out of danger. In setting aside a verdict for mental anguish the court said:

"It is difficult to understand how it was possible for the appellee to suffer mental anguish from the non-delivery of a message of which he had no knowledge. He did not know that the message had been delivered to the company until he reached Gulfport. He did not know that the message had been delayed until after the agony was a thing of the past. The failure to deliver the message may make a case for the infliction of punitive damages, but this breach of duty could not, in the nature of things, authorize damages for mental anguish. The failure to deliver the first telegram doubtless spared him the agonies he would have endured.

RESPONSIBILITY OF GENERAL EMPLOYER FOR THE TORT OF CHAUFFEUR OCCURRING DURING PERIOD IN WHICH AUTOMOBILE AND CHAUFFEUR ARE RENTED TO SPECIAL EMPLOYER.

The question mentioned in the caption is gradually assuming a position of much practical importance in the legal and commercial activities of the present day. This is explained by the increased usage of vehicles, especially automobiles and the growing practice of owners in hiring these vehicles, with attendants, for commercial purposes.

The purpose of this writing is to examine all aspects of the matter and to endeavor to present the proper test and the correct solution.

Any responsibility which may adhere to a general employer for a tort committed, during the hiring period, and by the driver of a vehicle, legally rests upon the doctrine announced in the legal maxims, *"Qui facit per alium facit per se,"* and *"respondeat superior."* The first mentioned maxim is an obvious untruth except so far as it expresses the truism that one, who deliberately carries out a design through the instrumentality of another, is the active perpetrator throughout. The thought enunciated, however, has been so twisted, expanded and misinterpreted that it today really only amounts to a fiction used to justify the attainment of a certain objective. The truth is that one does not perform every act himself which he performs through an agency. *"Respondeat superior"* is the expression which gives us more real trouble than any other theory of law. Indefinite in origin, incapable of exact application, it trips lightly off of the tongue as an excuse in many difficulties.

Indeed, one may venture, not improperly, to characterize the modern doctrine of vicarious responsibility for the acts of others as a veritable upas-tree. Practically unknown to the classical jurisprudence of Rome, unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy, and it cannot but operate to check enterprise and to penalize commerce.

The doctrine originally was based on the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. Prof. Wigmore is even bold enough to state that the doctrine was given birth by the spirit of revenge.

The doctrine was first applied in the ancient Germanic law when a master was held absolutely liable for harm done by his slaves, without any qualifications whatever. Later, the yoke was eased by furnishing the master with various excuses. The Roman law seems to have always looked upon the doctrine with apprehension and never completely adopted it.

A few cases appear in the English common law before the 17th century in which the idea was inaptly applied, but it was not until 1709 that Lord Holt attempted to definitely announce the rule, in the case of Hern v. Nichols.[1] A merchant had entrusted silk to an agent abroad. The agent sold the goods through fraud by misrepresenting the quality and the purchaser brought an action of deceit against the merchant. The court allowed a recovery, saying: "For seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver, should be the loser, than a stranger." (Just as though the buyer as well as the seller had not reposed trust and confidence.) This decision is based on confidence and it really is one of contract, being only tort in form.

But the illogical basis of this decision did not satisfy the jurists, and various the-

(1) 1 Salks. 289.

ories have been advanced in support of the rule, some ridiculous. Reputable judges have sought to explain by offering such reasons as follows: Profit; Revenge; Carefulness and Choice; Identification; Evidence. (Eyre says: "It is difficult to prove exactly who directed the damage, but you can tell whose servant did it."); Control, advocated by Raymond and Erskine, and which the writer maintains to be the true justification; Indulgence—Francis Bacon avers: "It is a great concession to have servants;" Danger—Pollack maintains that "it is an especially dangerous thing to embark in business, it carries a profound responsibility; and Satisfaction—supplied by Maitland with the observation that servants are an impecunious race.

This doctrine must be traced historically through a series of stages from a time when the common law of England considered the question from a point of view opposite to that which is accepted now. All through the mediaeval period, as reflected in the Year Books, the view prevailed that a master is responsible for *any* wrongs committed by his servant in the course of his employment. In the sixteenth century the courts began to recognize that it was unfair to put such a wide construction on the liability of the master, and the doctrine of *general employment* was modified by the requirements of *particular authority* on the part of the master. This means that the "master in order to be liable must have commanded the very act in which the wrong consisted." Towards the end of the seventeenth century a reaction set in. "The nation was reaping in commercial fields the harvest of prosperity sown in the Elizabethan age and destined to show fullest fruition in the age of Anne. The conditions of industry and commerce were growing so complicated, and the original undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated."[2]

It came to be assumed that masters and employers were responsible for the acts of their servants and employes in so far as the latter could be held to have acted by their express or *implied command*. This is the view followed by the courts under the influence of judgments of Lord Holt and Lord Hardwicke in the eighteenth century. In order to meet the complicated requirements of growing industry and commerce, the chief stress was laid on determining how far an agent was acting for his master's business or benefit; this became the test of an *implied command*, and the master's responsibility for torts committed by the agent was co-extensive with the authority which he was deemed to have given. Lastly, about 1800, the doctrine assumed its modern shape, chiefly through the action of Lord Kenyon as Chief Justice of the King's Bench. The test of responsibility came to be expressed in the words "within the scope of the employment." Thus we see that the law as to the responsibility of masters and employers has passed through four stages of development, and that it was elaborated by means of decisions of the courts under the influence of changing conditions and opinions.[3]

This same doctrine, born in obscurity and reared in uncertainty, was adopted by the American Colonies as outlined in Holt's dictum, and the English decisions have been followed by the American courts, with apparent docility and without any spirit of inquiry.

Not only has the rationale of the rule been confused since its birth and through its entire history, but all harmful agents have been considered as of one class. No distinction has been made between the agencies used, whether human, inanimate

(2) J. H. Wigmore.
(3) Vinogradoff on "Common Sense in Law."

or animals. I find that in most of the English decisions the facts include vicious animals or such inherently dangerous substances as fire, explosives or poisons. No allowance is made for the fact that a human agency is capable of individual responsibility, whereas a master uses a dangerous inanimate object at his peril.

Again, a tort of this character has often been confounded with the principles of contract. There is a wide difference between the doctrine of agency in contract and that of respondeat superior in tort. The agency in contract holds the master to a stricter accountability, and rightly so, yet the two principles have been and still are often confused. In contract, the principal invites the public to deal with his agent, the principal knows aforehand what the result will be one way or the other, and he can measure his risk if the agent is guilty of misconduct. But surely the owner of an automobile does not invite the public to use the highway in reliance on the care and skill of the chauffeur. The risk of the master under a loose interpretation of the rule in tort cannot be calculated. Thus any blending of the principles of agency in contract with the facts in tort reacts to the detriment of the master.

The doctrine of respondeat superior is artificial and arbitrary, without foundation in natural law and supported these many years only by cunningly contrived judicial fictions. It was never conceived in legal logic.

But to get closer to my text, I shall now affirm that unless an automobile is an inherently dangerous instrument, the only basis upon which a prospective master can be held legally responsible, is control. The unanimous agreement of the judicial decisions is to the effect that automobiles are not inherently dangerous. The relation of master and slave, wherein the rule was given birth, knew no such qualifications as right to "hire and fire" and duty of payment of wages. In that relation the doctrine was evolved simply because of the personal control exercised by the master. And yet, at this day, we often hear courts harping on the receipt of benefits by the general employer. Does not the special employer also receive the benefits of the employe's labor? Seemingly we are unable to put aside the idea of contract and to realize that the rule applies only to those who have control and direction. One cannot legally, for any benefit, direct another to commit a wrong or even allow it, either in contract or tort.

The questions of "hiring and firing," receiving benefits, and paying wages are collateral and should be considered only as aids in determining where the control lies. The responsibility for the tort of another is purely personal, can never be based on contract or agreement, but solely upon the carrying out of commands and directions, imminently preceding the tortious act.

Control is the only test we have for distinguishing between servants and independent contractors. The relation of master and servant is essentially based on control. Control is the test to be used in determining who is the master.

In connection with the subject there has arisen a class of decisions known as the "carriage" or "taxicab" cases. These refer to vehicles hired with driver for a single trip, to a designated destination, during a certain time and for an ascertained hire. The master never parts with control of the driver and the passenger is not even in the position of bailee. He is being carried to a certain point, just as an expressman would carry a parcel. These cases are in nowise analogous to the one under consideration and yet they have often been confused. In the assumed case, the general employer parts with control absolutely and places the driver under the direction of the hirer as to destination, route and length of service.[4] The reasonable rule is

(4) Donovan v. Laing, L. R. 1893, 1 Q. B. 629.

stated in Labatt on Master and Servant, but has been applied by the courts somewhat reluctantly.

Under What Circumstances a Servant in the General Employment of One Person Becomes the Special Servant of Another Person.—"The present subtitle will be devoted to an examination of the cases in which it has been sought to impose or escape liability on the ground that the servant whose position was the subject of controversy had been deputed to perform the work in question for the immediate benefit of a third party, and that the conditions attending the execution of the work were such as to constitute him while it was in progress, the special servant *pro tempore* of the third party. The doctrine in reference to which the injury in these cases is conducted may be stated thus: One person may be taken to have been the servant of another in respect of a given transaction, although he did not occupy that position for all purposes. In order to establish the relationship, it is merely necessary to show that he was a servant as regards the particular piece of work in which he was engaged at the time when he sustained or inflicted the injury complained of. In other words, the existence of the general relation of master and servant does not exclude a like relation with another employer, to the extent of the special services in which the servant may have been actually engaged.

"The consequences of establishing the fact that a servant has been transferred for a specific period, or in respect to the execution of a particular piece of work, to the employment of a person other than his general master are as follows: The special master is alone liable to third persons for injuries caused by such wrongful acts as the special servant may commit in the course of his employment."[5]

"The doctrine applied in the decisions which exemplify this situation is that 'when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.' In other words, the servant of 'A' may, for a particular purpose or on a particular occasion be the servant of 'B,' though he continues to be the general servant of 'A,' and is paid by him for his work."[6]

But I have heard it contended the general employer would not be willing to rent the vehicle without the driver and therefore he deserves a certain degree of the control. The tort is committed by the driver and not by the machine. Merely because one wishes to know that his property is being properly taken care of does not indicate that the right to control the driver is reserved.

No matter how gross the negligence proven, nor how serious the injuries sustained, if the plaintiff in an action cannot prove agency, no recovery should be allowed. The burden is upon the plaintiff to prove agency and the courts are liberal in aiding the claimant to sustain this burden. The defendants in most cases look upon it as a matter of course. In actions involving the facts suggested in the title, defendants should require strict proof of agency and plaintiffs often will find themselves in difficulty, notwithstanding the usual presumption based on admitted ownership.

A troublesome source of confusion has been the failure of the courts to distinguish between the right of control whether exercised or not and the actual control. They have based the liability of the general employer upon his right to control rather than upon the actual control or direction exercised at the time the accident occurred. The dilemma of the courts has been very pithily expressed by Justice Townsend of the Supreme Court of Indiana,[7] as follows:

"At first the courts, like the horses, seemed to be afraid of automobiles and were inclined to stretch the rule of respondeat superior and to hold the owner liable on one pretext or another, whether the driver

(5) Vol. 1, Section 52.

(6) Section 57.

(7) Martin v. Lilly, 121 N. E. 443.

was acting for the owner or not. This departure from the reasonable and practicable rule, that the principal shall respond in damages for the torts of his agent only when the agent is acting for the principal, soon led to absurdities and injustice. And courts have been sitting up nights writing volumes to get back to the correct rule. Witness: Hays v. Hogan, decided December, 1917, 273 Mo. 1, 200 S. W. 286 L. R. A. 1918 C. 715, and cases there cited, discussed, distinguished, analyzed and overruled. If the reader is not surfeited when he has examined this authority, then see Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916 A 954, Ann Cas. 1916 A 659; Luckett v. Reighard et al., 248 Pa. 24, 93 Atl. 773, Ann. Cas. 1916 A 662; Smith v. Burns et al., 71 Ore. 133, 135 Pac. 200, 142 Pac. 352, L. R. A. 1915 A 1130, Ann. Cas. 1916 A 666; Janik v. Ford, etc., Co., 180 Mich. 557, 147 N. W. 510, 52 L. R. A. (N. S.) 294, Ann. Cas. 1916 A, 669, and notes appended to these cases in Annotated Cases 1916 A.

"An automobile is not a dangerous instrument. The rules of law are applied to it in the same manner as to other vehicles. Authorities above."

As evidence of the sane and progressive trend of the more intelligent courts, attention is called to the following citations:

"Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. * * * The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."[8]

"One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation."[9]

(8) 26 Enc. Law & Practice, 1285.

(9) Standard Oil Company v. Anderson, 212 U. S. 215.

"The Ice Company let to the Coal Company a pair of horses, wagon and driver. This happened frequently and on one occasion under this arrangement, Scribner worked for the Coal Company two or three months. He received his wages from the Ice Company. The proprietor of the Ice Company testified that he 'looked to Scribner to take care of the horses and the team which he owned, but exercised no supervision with respect to his delivering coal.' 'Scribner worked there the same as their men did, and took his orders from the office of the Coal Company.' The employe testified that Mr. Twitchell (one of the clerks employed by the Coal Company), told him where to deliver the material; that he took his directions from Twitchell; that he helped to load coal, brick, wood, lime or cement, and that sometimes he had a helper when making deliveries.

"In determining whether, in a particular act, he is the servant of an original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result." Shepard v. Jacobs, 204 Mass. 110, 112, 90 N. E. 392, 393, (26 L. R. A., N. S., 442, 134 Am. St. Rep. 648).

"The test is whether, in the particular work which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired."[10]

"Applying these tests, it is clear that Scribner, at the time of the injury, was an employe of the Coal Company, he was in that company's yard, engaged in its business and doing its work; and he was under its direction and subject to its orders. Whatever may have been the relation of Scribner to the Ice Company, in the care and management of the horses, at the time of his injury he was engaged in work over which that company had no control. The business was that of the Coal Company and under its direction. The transaction between the two companies amounted only to a loan of the Ice Company's servant to the Coal Company, the servant became the employe of the latter for the time being,

(10) Scribner (Mass.), 120 N. E. 350.

and on the evidence he must be found to have assented to this, although remaining in the general employment of the Ice Company. Coughlan v. Cambridge, *supra;* Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Samuelian v. American Tool & Machine Company, 168 Mass. 12, 46 N. E. 98, and cases cited."[11]

"Pullman, the plaintiff, was an employe of the Light Company and was injured through the negligence of one Elkman, who at the time of the accident, was employed by the defendant, the Cab Company. The Light Company hired from the Cab Company the services of a horse, wagon and driver to assist in the erection of poles and wires. The plaintiff, having occasion to get a chisel which had been brought out in the wagon, went to the wagon in which the driver was and asked for the chisel. The driver thereupon picked it up and threw it to the plaintiff in such a manner that it struck him on the knee and caused a severe injury. At the trial a compulsory nonsuit was entered upon the ground that the evidence showed that when the accident occurred, Elkman, the driver, was, for the time being, in the employ of the Light Company and not that of the defendant. This judgment was affirmed. At page 397, the Court uses this language:

" 'While Elkman was in the general service of the express and cab company, yet, in the opinion of the trial judge, it clearly appeared from the evidence that he was at the time in the particular service of the Light Company, and was under its direction and control.' "[12]

"The distinction between the carriage cases and one like the present is pointed out by the Master of the Rolls, Lord Esher, As he says, the coachman is only under the control of the hirer to the extent of indicating the destination to which he wishes to be driven; and, in distinguishing the control of the owner in such a case from that in the instance before him, he said: 'In the present case the defendants parted for a time with the control over the work of the man in charge of the crane, and their responsibility for his acts ceased for the time."[13]

"The carriage cases are distinguished with the final comment that 'it is manifest, therefore, that they have no application whenever it appears that the master has parted to another, for a time, with control over his servant, to be used in the work of that other.' "[14]

"A servant in the general employment of one preson, who is temporarily loaned to another person to do the latter's work, becomes for the time being the servant of the borrower, who is liable for his negligence."[15]

"One Clark, a logging contractor, hired of the defendants Veness and Shives an auto truck, pursuant to the following agreement:

" 'The contract was drawn for either twenty-five or thirty dollars a day. I don't recall which it is for certain. They were to furnish the driver and truck, and he (Clark) was to furnish oil and gas and any repairs, breakage, to keep the truck in repair and driver's time—the truck's time was to be with the driver's time; if he worked more than eight hours, why the truck was to be more than eight hours; that price was to be an eight-hour price, and over that the truck was to draw the same ratio.'

"This agreement, it is alleged, was made in writing, but subsequently lost, and the foregoing is the oral testimony of the witness Clark as to its contents. While so engaged for Clark, Smith, the driver, collided with a buggy occupied by the appellants, with consequent more or less severe injury to one of them, and considerable damages to the vehicle. The action for damages which ensued was laid against Veness and Shives, as the owners of the hired truck. At the conclusion of the plaintiff's case, the court sustained the defendant's motion for a nonsuit. This appeal is taken from such action by the trial court.

"All the material facts in the case are undisputed: The ownership of the truck by Veness and Shives; their employment of the driver Smith; the contract of hire to Clark, and the injury occasioned by what may fairly be conceded to be the tortious

(11) Coughlan v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218, 219.

(12) Pullman v. Standard Express Co., 259 Pa. 383.

(13) Donovan v. Laing, et al., L. R. (1893), 1 Q. B. 629.

(14) Bryne v. Kansas City, 61 Fed. 605.

(15) Hartwell v. Simonson & Son Co., 218 N. Y. 345. Also see Schmedes v. Deffaa, 214 N. Y. 675; Standard Oil Co. v. Allen (Ind.), 121 N. E. 329; Carr v. Burke (169 N. Y. S. 981).

carelessness, or almost wantonness, of Smith, to the appellants Olson, the pivotal question of the case being: Was Smith the servant of Clark or of Veness and Shives for the purposes of this action?

"The only and uncontradicted facts before the court touching the character of Smith's employment by Clark were as follows: On the morning of June 28, 1918, this truck driven by Smith, who previous to that time had been working for the respondents, started to work for Clark. From the time it left its owners, the truck was operating on Clark's time, and was so operating at the time of the accident. Clark hired the truck so that he could control and operate it as his business demanded, paying for both truck and driver at the contract price per day.

"Appellants contend that this was an employment somewhat analogous to that of one hiring a vehicle for a given trip, as a carriage or taxicab, and that Smith was, in fact and law, the servant at all times of respondents. They attach considerable weight to the fact that respondents alone hired Smith, and insisted upon his being hired with the truck, and, presumably, they alone could discharge him. The question of the right of discharge in such cases is but incidental. If Clark had been dissatisfied with Smith's services, he could have effected his discharge or removal by complaint to the respondents, or, by terminating the hiring of both truck and driver; the fact of the discharge would originate with the dissatisfied hirer, though the actual words might alone come from the original employer of the servant.

"(1, 2) To our minds, the question of control of operation is the determining factor in this case. The respondents in the course of business had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must *ipso facto*, have effected a transfer of responsibility. If such be the fact, we feel that respondent's contention that the hirer stood, in relation to the law of this case, as if he had purchased the truck and hired the driver, must logically follow. There being no disputed facts to go to the jury, the trial court did not err in so deciding as a matter of law. Babbitt v. School District, 100 Wash. 392, 170 Pac. 1020.

"The judgment must be and is affirmed."

Chadwick, C. J., and Parker and Mount, JJ., concur.[16]

The floundering inconsistencies of the courts on this subject are gradually being controlled and directed into the logical middle course of sound reason, which indicates that an employer should only be liable for the torts of his agent while actually under his control.

WEBSTER C. TALL.

Baltimore, Md.

(16) Olson et ux. v. Veness et al., 178 Pac. Rep. 882. (Supreme Ct. of Wash., Feb. 24, 1919.)

INSURANCE—SUICIDE.

SCALES v. NATIONAL LIFE & ACCIDENT INS. CO.

Supreme Court of Missouri, in Banc. May 16, 1919.

215 S. W. 8.

Intentional self-destruction by a sane person is not an accident.

Plaintiff recovered judgment for $700 and interest on a life and accident policy issued by defendant to William C. Scales, in which this plaintiff, his widow, is the beneficiary. Defendant appealed to the Springfield Court of Appeals, where, in an opinion by Farrington, J., reported in 186 S. W. 948, the judgment was reversed and the cause remanded, with directions to enter judgment for $140. But that court, deeming its opinion in conflict with that of the St. Louis Court of Appeals in Applegate v. Travelers' Insurance Co., 153 Mo. App. 63, 132 S. W. 2, certified the cause to this court.

The policy was dated December 9, 1909, and provided for payments as follows:

(1) In case of death by accident, $700.

(2) In case of death from disease or poison, or from self-inflicted injuries, one-fifth of the amount above named.

There are no other provisions in the policy that affect the issues here involved.

It is conceded that the insured committed suicide by drinking carbolic acid, a poison, on October 17, 1914, and that notice and proof of death were duly made and given. There is no evidence in the cause as to whether the insured was sane or insane at the time he drank the deadly potion. The trial was before the court without a jury. The defendant asked the following declaration of law, which was refused:

"The court declares the law to be that, if it believes and finds from the evidence that death resulted to the insured, W. C. Scales, caused by taking carbolic acid, a poison, intentionally, then it will make a finding in favor of the plaintiff, to-wit, $140, together with interest thereon at the rate of 6 per cent per annum from October 17, 1914, to date."

The only point here involved is the propriety of the refusal of that instruction.

The case of Newell v. Fidelity and Casualty Co., 212 S. W. ——, which was argued in this court on the same day on which this case was argued, and which involved the same question, has been considered in connection with this case, and we have availed ourselves of the able and exhaustive briefs of counsel in both the cases.

ROY, C. (after stating the facts as above). I. There are some clear and undisputed rules of law which should be borne in mind in the consideration of this case:

1. A policy of insurance against death by accident covers a death by suicide by a person who is at the time insane. In other words, death by suicide of an insane person is death by accident. Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740. That proposition is conceded by both parties herein.

2. Intentional self-destruction by a sane man is not an accident. In Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638, it was held that a voluntary death is not a death by accident. A long line of authorities is there cited.

In Young v. Railway Mail Ass'n, 126 Mo. App. 325, 103 S. W. 557, the Lovelace case was cited, and it was held that a death is accidental when it "is not the natural or probable consequence of the means which produced it."

3. On the question as to whether the insured was sane or insane at the time of committing suicide, the presumption is in favor of his sanity, and the burden of proof is upon the one affirming the contrary. Blackstone v. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 844, 18 C. C. A. 332; Insurance Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Reynolds v. Maryland Casualty Co., 274 Mo. 83, 201 S. W. 1128.

It necessarily follows that the insured in this case is presumed to have been of sound mind when he killed himself.

We think the "suicide statute" is clear, so far at least as the point here involved is concerned. Here it is:

Sec. 6945. "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

That statute does not put into the policy a single obligation other than those mentioned in the policy. It merely takes out of the policy the defense of suicide as to the obligations mentioned in that policy.

Without embarrassing ourselves just here with a consideration of any of the decided cases, we will apply the statute to this policy and see how and to what extent it affects it. The policy contains the following obligations on the part of the insurer:

(1) To pay $700 in case of death by accident. That includes death by suicide by an insane person, and does not include death by suicide by a sane person.

(2) To pay $140 in case of death by disease or poison or by self-inflicted injuries. Let it be conceded here, without deciding, that death by self-inflicted injuries includes death by suicide whether the insured was sane or insane.

Has the plaintiff here any cause of action under the first or accident clause of the policy? If the insured had been insane when he drank the poison, the suicide would have been an accidental death covered by that accident clause and the defense of suicide would have been taken out of the policy by the statute. But the plaintiff here has not that kind of a case. Indeed, she has no case at all under that accident clause, for the death here was not by accident. Though there is no obligation written in this policy under which plaintiff, under the facts of this case, can recover more than $140, yet she claims that the statute puts such obligation into the policy. This court

is thereby asked to inflate the statute with something not thought of by the legislature, and to thereby inflate the policy with an obligation not mentioned therein. Though death from disease, undesired and shunned, is not an accident, yet respondent claims that, by reason of the statute, self-destruction, though voluntarily and deliberately done by a sane person, is an accident.

The vital point in this case is whether, under the statute, a policy of insurance against death by accident makes the company liable in case of the death of the insured by suicide while sane. That point so far as we can discover, was not raised or discussed in any of the cases cited by respondent, not even in this case in the Court of Appeals. It was first raised after the case reached this court.

In Logan v. Fidelity & Casualty Co., 146 Mo. 114, 47 S. W. 948, it was agreed by the parties that the insured came to his death from "external, violent and accidental means." It was also conceded that he committed suicide. In other words, it was conceded that it was a death by accident. The court there correctly held that an accidental death by suicide was covered by the accident policy, and that the statute applied and took away the defense of suicide. It did not hold or intimate that a suicide by a sane person was an accident or was covered by an accident policy. It did not touch the question now under consideration, because such a question could not arise under the agreed facts of that case.

In Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, Knights Templar, etc., v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139; Applegate v. Travelers' Ins. Co., 153 Mo. App. 63, 132 S. W. 2, and in Brunswick v. Ins. Co., 195 Mo. App. 651, 187 S. W. 802, the vital point now under consideration was not discussed or decided. The plain truth is that courts and counsel in all those cases proceeded on the theory that, under the Logan case, suicide by a sane person was an accident covered by an accident policy, an assumption absolutely without any foundation, as we have seen.

PER CURIAM. The foregoing divisional opinion is adopted by the court in banc.

WALKER, J., concurs.

FARIS, BLAIR, WILLIAMS and GRAVES, JJ., concur in result for reasons stated in Brunswick v. Standard Acc. Ins. Co., No. 19764.

BOND, C. J., not sitting.

WOODSON, J., absent.

NOTE—*Death by Suicide "by an Insane" As or Not Covering Act by One Unconscious of Its Physical Effect.*—In Interstate Business Men's Acc. Assn. v. Atkinson, 165 Ky. 532, 177 S. W. 254, L. R. A. 1915E, 656, the clause against suicide was that a company was not to be liable if injury is sustained by insured when insane, is not controlled by decision regarding insurance where policies provide against liability where one is so insane as not to understand the nature of a physical act which results in his death. The opinion distinguishes all such cases by saying that they turned on the mental capacity of an insured to understand the nature and consequences of an act he was doing, while the policy before the court does not regard such capacity, but merely the fact of the time when the act is done—that is to say, during the time the insanity continues. This is a provision for suspension of the insurance and is not unreasonable.

In Blunt v. Fidelity & C. Co., 145 Cal. 268, 78 Pac. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34, there was a like clause in a policy and the court said: "The effect of this clause is that the defendant did not agree to insure," etc., "during such part of the time covered thereby as the insured should be insane." It was said, also, that: "There was good reason for the insertion of the clause. A sane man will naturally and instinctively protect himself from injury, while if insane, he might unconsciously expose himself thereto."

And even as to policies which speak of self-destruction by an insane, North Carolina Supreme Court thought that arguing for a difference between not understanding the moral nature and physical nature belongs rather to the domain of speculative psychology than to the practical administration of the law. Sprull v. N. W. Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39.

In Hart v. Mod. Woodmen, 60 Kan. 678, 57 Pac. 636, 72 Am. St. Rep. 380, the question of distinction between consciousness of physical nature of an act and its quality as a moral act was avoided, because in the case at bar there was no room for it. But there are many *dicta*, at least, which allude to such a distinction.

Thus, in Clarke v. Equitable L. A. Co., 118 Fed. 374, 55 C. C. A. 200, the contention of a lack of intelligence not to know the physical nature of an act working self-destruction would be to compel courts to split insanity into degrees and this ought not to be done. And to the same effect seems Seitzinger v. Mod. Woodmen, 204 Ill. 58, 62 N. E. 478.

But the case of Cady v. Cas. Co., Wis., 113 N. W. 967, 17 L. R. A. (N. S.) 260, rules squarely that the phrase "death by suicide, sane or insane," does not include death by act of an assured without any moral purpose of self-destruction. It was said the words meant only "intentional self-destruction." Many prior Wisconsin cases are cited in support of this view.

In Streeter v. M. L. L. & A. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882, it was said that if one does a thing unconsciously or involun-

tarily, whether he is sane or insane, this, though resulting in death, will not avoid a policy against his dying by his own hand, sane or insane. But the observation was made rather argumentatively than otherwise.

In Maunch v. Sup. Tribe B. H., 91 N. Y. Supp. 367, 100 App. Div. 49, it was said that where self-destruction was not her voluntary, intelligent or rational act, it did not come within the inhibition against "suicide whether sane or insane, or whether voluntary or involuntary." There it was held there was meant intentional suicide as a bar to recovery and not an unintentional act resulting in death.

In Haynie v. Knights Templar & Co., 139 Mo. 427, 41 S. W. 461, the court thought the words, "in case of suicide," "death by one's own hand, act, or intention," and "self-destruction of the insured," "whether voluntary or involuntary, sane or insane," eliminated all question of intention by insured. All of this, however, was addressed to the question of death from an irresistible insane impulse. This, therefore, is not conclusive on the point of one killing himself when not appreciating the physical result of his act.

After all, however, this seems more a question of the construction of the terms of policies than anything else, all of the cases impliedly admitting that an insurer has the right to suspend a policy during the continuance of insanity. C.

ITEMS OF PROFESSIONAL INTEREST.

OUR OLDEST SUBSCRIBERS.

Our esteemed correspondent, Mr. August Binswanger, of Chicago, in renewing his subscription, calls attention to the fact that he has been a subscriber to the Central Law Journal since 1874, and wishes to know whether he is not the oldest of our subscribers.

He is entitled to that distinction, except that, according to our records, he must share it with three others: Mr. E. M. Ashcraft, Chicago, Ill.; Mr. R. J. Grier, Monmouth, Ill.; and Hon. Shepard Barclay, St. Louis, Mo. All these gentlemen have been subscribers from the beginning.

BOOKS RECEIVED.

Constitutional Power and World Affairs. By George Sutherland, former United States Senator from Utah. New York. Columbia University Press. 1919. Review will follow.

HUMOR OF THE LAW.

"So this is your law office?"

"Yes."

"And these are your law books?"

"Yes."

"What a fashionable tan shade," was the next remark.

Attorney—Now, sir, you have stated under oath that this man had the appearance of a gentleman. Will you be good enough to tell the jury how a gentleman looks, in your estimation?

Down-trodden Witness—Well, er—a gentleman looks—er—like—er—

Attorney—I don't want any of your "ers," sir; and remember that you are on oath. Can you see anybody in this courtroom who looks like a gentleman?

Witness—I can if you'll stand out of the way.

The candidate was rather surprised, when he faced the "audience," to find it consisted of one solitary person. Realizing, however, that an election may be won by one, so to speak, he braced himself up and delivered his address as to a "packed house."

After an hour and a half of pledges and promises, he wound up with:

"And now, my dear sir, I will not encroach upon your valuable time any longer—

"Oh, it's all right, guv'nor," interrupted the "audience." "Fire away! Don't mind me; I'm only your taxi-driver."—*Tit-Bits.*

Recently an action was tried before a local justice court. The justice of the peace was a man of a superior estimate of his legal ability. The action was one for damages against a local street car company. The plaintiff and defendant each introduced their testimony, and at the conclusion of the trial the honorable justice sagely decided that he would find for the defendant under the rule of the "first clear chance" doctrine. The surprised attorney for the plaintiff rose and remarked to the court that there was no such law. Whreupon the justice waived him aside and told him to read law and he would find it in the books. The attorney for the street car company left the court room smiling and utterly bewildered.—*Docket.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assignments**—Wages.—When wages to be earned under an existing or known and identified employment are assigned, there may be a reasonable expectation by the parties that the wages will be earned, and, such possibility or expectancy being coupled with an interest, the thing assigned has a potential existence, and the assignment is valid.—McKneely v. Armstrong, Tex., 212 S. W. 175.

2. **Bankruptcy**—Adjudication.—Upon the filing of a petition in bankruptcy followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes into the custody of the bankruptcy court and becomes subject to its jurisdiction to determine adverse claims thereto, whether of title or liens.—Spencer Commercial Club v. Bartmess, Ind., 123 N. E. 435.

3.——Assumption of Lease.—A trustee in bankruptcy may at his option assume a lease of the bankrupt, or decline to assume it, as an asset of the estate, and he has a reasonable time within which to exercise this option, and if he considers the lease of value, and assumes it, the bankruptcy operates like any other assignment, and the bankrupt is released from all liability for rent thereafter, but if he deems the lease of no value to the estate, and refuses it, this does not avoid the lease, but leaves the bankrupt lessee liable as before.—Rosenblum v. Uber, U. S. C. C. A., 256 Fed. 584.

4.——Discharge.—Discharges in bankruptcy should follow as a matter of right, where no objections are filed by the creditors or trustee, the parties in interest, to application seasonably made.—In re Walsh, U. S. C. C. A., 256 Fed. 653.

5.——Jurisdiction.—Jurisdiction of federal District Court of suit by trustee to avoid transfers by bankrupt is to be determined, not on the conclusions on the merits of the action, but on consideration of the allegations of the bill.—Flanders v. Coleman, U. S. S. C., 39 S. Ct. 472.

6. **Carriers of Goods**—Bill of Lading.—Clause in bill of lading exempting carrier from liability in case of destructon by fire of the cotton shipped is not forbidden by the Carmack Amendment; a reduced rate being the consideration, and no negligence of carrier being shown.—E. Borneman & Co. v. New Orleans M. & C. R. Co., La., 81 So. 882.

7.——Connecting Carrier.—A connecting carrier receiving a shipment of goods which was not routed over its line will be charged with knowledge that it was aiding in misrouting the shipment, where the bill of lading and waybill designated the proper route.—Lancaster v. Schreiner, Mo., 212 S. W. 19.

8.——Ordinary Care.—A carrier's common-law liability is that of an insurer of goods shipped, while the liability of the warehouseman is based upon ordinary care.—Bufton v. Southern Express Co., Mo., 212 S. W. 74.

9. **Carrers of Live Stock**—Expense in Effort to Save.—Where animal has been killed or rendered worthless by injury in transit, a recovery may sometimes be had in excess of its value by reason of expenses of an unsuccessful, but reasonable, effort to restore it to usefulness, but this is true only of expenditures made in a just expectation by reducing carrier's liability by amount expended.—Kennedy v. Atchison, T. & S. F. Ry. Co., Kan., 181 Pac. 117.

10. **Charities**—Trustee.—A charitable trust will not fail for want of a trustee, or inability of party named to act, but chancery will designate another trustee.—Laswell v. Hungate, U. S. C. C. A., 256 Fed. 635.

11. **Chattel Mortgages**—Constructive Notice.—Holder of mortgage, to be protected as against purchaser for value, must show compliance, in all respects, with recordation statutes, or that purchaser had actual knowledge of his mortgage.—Howe v. Simison, Ala., 81 So. 837.

12. **Commerce**—Discrimination.—Ordinance requiring removal of railroad track from crossing of streets does not offend against commerce clause of Constitution; it making no discrimination against interstate commerce, and not impeding its movement in regular course, and affecting it only incidentally and indirectly.—Denver & R. G. R. Co. v. City and County of Denver, U. S. S. C., 39 S. Ct. 450.

13. **Contracts**—Acceptance.—Where the terms of a letter of proposal are accepted with certain qualifications, contract is not complete until terms imposed by letter of acceptance are agreed to.—McCone v. Eccles, Nev., 181 Pac. 134.

14.——Consideration.—The extent of duty created by contract is not determined by the kind of consideration on which it is based; it being sufficient if the consideration is such as the law deems valuable, without regard to its nature or character.—M. M. & D. D. Brown v. Western Maryland Ry. Co., W. Va., 99 S. E. 457.

15.——Mutuality.—A contract by which defendant agreed to furnish plaintiff with such coal as should be ordered by him up to 25,000 tons per year, but which did not obligate plaintiff to purchase any quantity, held not enforceable by plaintiff for lack of mutuality.—Leach v. Kentucky Block Cannel Coal Co., U. S. D. C., 256 Fed. 686.

16.——Place of Contract.—A contract may be valid and enforceable where executed, but unenforceable in another jurisdiction.—The Strathearn, U. S. C. C. A., 256 Fed. 631.

17. **Corporations**—Accepting Benefits.—A corporation that accepts the benefits of a contract entered into by an officer thereby ratifies his acts, and cannot set up as a defense that the contract was entered into without authority or that it was ultra vires.—McBride v. Western Pennsylvania Paper Co., Pa., 106 Atl. 720.

18.——Bondholders.—Stockholders, who were officers, bondholders, and creditors of a railroad corporation had same right as any creditor

or stranger to bid for property of corporation at a foreclosure sale, where corporation had not been under their control for some time, having been in the hands of a receiver, and the stock owned by them was valueless and did not enter into purchase price.—Sebree v. Cassville & W. R. Co., Mo., 212 S. W. 11.

19.——Bonus.—Corporate stock issued as a bonus for a loan of $20,000 to the company by stockholders was not issued for services within Code Pub. Civ. Laws, art 23, § 35; a "bonus" meaning something given in addition to what is ordinarily received by or strictly due to the recipient, while a "service" is the performance of labor for a benefit of another or at another's command.—Hopper v. Brodie, Md., 106 Atl. 700.

20.——By-Laws.—While ordinarily by-laws are made by the stockholders, yet, where the statute gives that power to the board of directors, the stockholders cannot change it or interfere with the board in this particular so long as such by-laws are reasonable and do not interfere with the vested and substantial rights of the stockholders or are not contrary to public policy or established law.—State v. Day, Ind., 123 N. E. 402.

21.——Over-valuation.—Where there is ground for a difference of opinion as to the value of property transferred to a corporation in return for its stock, on the issue of over-valuation the benefit of the doubt will be given the stockholders.—Clinton Mining & Mineral Co. v. Jamison, U. S. C. C. A., 256 Fed. 577.

22. **Criminal Law**—Corroborating Accomplice.—The uncorroborated evidence of an accomplice, if straightforward and unequivocal, may sustain a conviction.—McGinniss v. United States, U. S. C. C. A., 256 Fed. 621.

23. **Death**—Imputable Negligence.—Where a mother worked out and allowed her child, six years old, to go to school, and the child visited a playmate, and was killed, while crossing railroad tracks, in returning home, the negligence of the mother, if any, cannot be imputed to child, and being remote will not defeat recovery for her benefit.—Johnson's Adm'r v. Rutland R. Co., Vt., 106 Atl. 682.

24. **Dedication** — Restrictions. — The general rule that a dedicator may impose such restrictions as he may see fit on making a dedication of his property to a public use is subject to the limitation that the restriction be not repugnant to the dedication or against public policy.—Roaring Springs Town-site Co. v. Paducah Telephone Co., Tex., 212 S. W. 147.

25. **Divorce**—Corroboration. — Corroboration, in order that a divorce may be decreed, need not be testimony given by another or other witnesses to all of identical facts to minutest particulars, but only such facts and circumstances as will make testimony believable, and it need not be the testimony of witnesses, but may be furnished by circumstances adequately established.—Bolmer v. Edsall, N. J., 106 Atl. 646.

26. **Easements**—Appurtenant. — An easement of way may be appurtenant to a tract of land even though not touched by the way granted when it clearly appears that such was the intention.—Bruns v. Willems, Minn., 172 N. W. 772.

27. **Equity**—Impertinence.—If matter contained in an answer is relevant or can have any influence in the decision of the subject-matter in controversy, it is not impertinent.—Boca Grande Inv. Co. v. Blanding, Fla., 81 So. 886.

28.——Multifariousness.—The question of multifariousness is one of convenience, and rests largely in the discretion of the court.—City of Pittsburgh v. Pittsburgh & L. E. R. Co., Pa., 106 Atl. 724.

29. **Estoppel**—Public Officer.—A public officer cannot estop or disqualify himself from acting at all times as the public interest may require in the performance of his official duties.—State v. Finch, N. C., 99 S. E. 409.

30. **Evidence**—Impeachment.—Where defendant in a negligence case makes admissions to third persons, they can be shown in evidence without laying a foundation in the nature of impeachment.—Klein v. Beeten, Wis., 172 N. W. 736.

31.——Notice to Produce.—It was not error for the court to permit the appellee to testify as to contents of a certain letter alleged to have been written by him, where the record shows that timely notice was served upon the appellant to produce the same.—Reserve Loan Life Ins. Co. v. Sumner, Ind., 123 N. E. 443.

32.——Presumption of Sanity.—A person is presumed sane in the absence of proof to the contrary, and such presumption is not overthrown by the act of committing suicide.—Wallace v. United Order of Golden Cross, Me., 106 Atl. 713.

33. **Fraud**—Reliance of Representation.—A representation relied upon to entitle a purchaser of land to damages must be of an ascertainable existing fact; one susceptible of knowledge, and not estimate or opinion.—Nichols v. Lane, Vt., 106 Atl. 592.

34. **Frauds, Statute of**—Executed Contract.—Although contract for sale of land was oral, if deed was delivered and accepted and part payment made by purchaser in accordance with the contract, the statute of frauds would not be involved.—Davis v. Greenlee, Mo., 212 S. W. 22.

35.——Time of Performance.—An agreement which does not, by its terms or by necessary implication, carry its full performance beyond a year, need not be in writing.—M. M. & D. D. Brown v. Western Maryland Ry. Co., W. Va., 99 S. E. 457.

36. **Fraudulent Conveyances**—Bulk Sales Act.—That stock of goods and fixtures were worth enough to meet seller's debts, but were sold in bulk for a grossly inadequate price, making seller insolvent, to buyer's knowledge was a badge of fraud.—Ward v. Stutzman, Mo., 212 S. W. 65.

37.——Notice of Fraud.—If a husband disposed of his stock of goods and conveyed his equity in certain lots to his wife with intent to hinder, delay, and defraud his creditors, and his wife had knowledge of such design, or had sufficient notice to put her on inquiry, the conveyance to her was fraudulent, and should be set aside.—Churchill & Alden Co. v. Ramsey, S. D., 172 N. W. 779.

38. **Guaranty**—Illegal Contract.—The guarantors of a contract illegal as attempting to destroy competition are not liable; it being necessary to rely on the original illegal contract in order to recover.—Southern Cotton Oil Co. v. Knox, Ala., 81 So. 656.

39. **Homestead**—Residence.—Wife who is a resident of another state cannot defeat incumbrance of property upon ground that it is a homestead, since benefits of homestead exemption under St. 1917, § 2203, are available only to residents of state.—Ludwig v. Ludwig, Wis., 172 N. W. 726.

40.——Timber on Land.—Where a wife did not sign her husband's deed conveying timber on their homestead, such deed was void as to timber on the homestead, or, at most, constituted the grantees licensees.—Blair v. Frank B. Russell & Co., Miss., 81 So. 785.

41. **Homicide**—Apparent Danger.—If the peril of defendant was not real, but merely apparent, and defendant knew or honestly believed his peril was not real, but merely apparent, he would not be justified in making a deadly assault to extricate himself from such apparent peril.—Carroll v. State, Ala., 81 So. 853.

42.——Neglect of Child.—If one owes to another a plain particular and personal duty imposed by law or contract, an omission resulting in the death of the party to whom such duty was owing usually renders the delinquent party guilty of homicide; so, where an infant child died by reason of her father's failure to provide proper medical attention, the father is guilty of homicide.—State v. Barnes, Tenn., 212 S. W. 100.

43.——Self-Defense.—One who has wrongfully provoked a difficulty involving a breach of the peace, and during the fight has killed his adversary, cannot maintain the position of perfect self-defense, unless at some time prior to the killing he quitted the contest, and in some way signified his purpose to do so.—State v. Finch, N. C., 99 S. E. 409.

44. **Husband and Wife**—Estate by Entirety.—Where property is conveyed to husband and wife, they take an estate by entirety carrying with it the right of survivorship, and neither, acting alone, can by deed destroy this right or affect the estate of the other.—Dorsey v. Kirkland, N. C., 99 S. E. 407.

45.——Estoppel.—Where husband conveying wife's property forged her signature to deed, wife's negligence in not ascertaining that deed was forged and in not promptly asserting a claim to the property, notwithstanding knowledge that purchaser's son was in possession, was not such fraud as to estop her from claiming the property.—Venters v. Potter, Ky., 212 S. W. 117.

46. **Innkeepers** — Extraordinary Liability. — The innkeeper's liability does not cease at the very instant a guest leaves the inn, but guest has a reasonable length of time, dependent on the circumstances of the case, in which to remove the goods, during which period the extraordinary liability of the innkeeper continues. —New Albany Hotel Co. v. Dingman, Col., 181 Pac. 126.

47. **Insurance**—Concurrent.—Warranty of insurance policy for concurrent insurance in a certain company can be subsequently waived.—American Fire Ins. Co. v. King Lumber & Mfg. Co., U. S. S. C., 39 S. Ct. 431.

48.——Exposure to Danger.—A hardware clerk, holder of an accident policy, who sold dynamite to celebrants of the Fourth of July, did not voluntarily expose himself to unnecessary danger in going with the celebrants to watch them set the dynamite off and taking refuge 10 feet inside a building to await the explosion.—Forcht v. North American Life & Casualty Co., S. D., 172 N. W. 781.

49.——Knowledge of Agent.—Knowledge of an insurance agent as to the premises which were the subject-matter of the insurance is chargeable to the insurer.—Williams Mfg. Co. v. Insurance Co. of North America, Vt., 106 Atl. 657.

50.——Note for Premium.—A note given for a premium does not operate as a payment in the absence of an express agreement to that effect. —Wagener v. Old Colony Life Ins. Co., Wis., 172 N. W. 729.

51.——Suicide.—Death by suicide of an insane person is death by "accident."—Scales v. National Life & Accident Ins. Co., Mo., 212 S. W. 8.

52. **International Law**—High Seas.—The high seas being common to all mankind, vessels afloat upon it are regarded as parts of the territory of the nations whose flag they fly and to which they belong, and the ships of a nation, wherever they may be, are regarded as part of its territory.—Bolmer v. Edsall, N. J., 106 Atl. 646.

53. **Judgment**—Abuse of Discretion.—Where counsel's neglect was induced by his misunderstanding his client's statement that he "settled that case," meaning another case, the court abused its discretion under Civ. Code Prac. § 340, in refusing to set aside the default.—Rosen v. Galizio, Ky., 212 S. W. 104.

54.——Ejectment.—Where a petition in ejectment shows on its face that plaintiff has no title to the premises sued for, a judgment by default in his favor is erroneous, and will be reversed.—Perry v. Snyder, Okla., 181 Pac. 147.

55.——Estoppel.—To constitute a complete estoppel by former judgment, the estoppel must be mutual and such as would conclude the party pleading the same if the judgment has been adverse to him.—Bell v. Bell, W. Va., 99 S. E. 450.

56.——Legal Tender.—Depositing amount of judgment with clerk of court, and notifying judgment creditor that the same was there subject to his demand, did not constitute a legal tender.—Rauer's Law & Collection Co. v. Sheridan Proctor Co., Cal., 181 Pac. 71.

57.——Parties and Privies.—Unless they come within certain well-recognized exceptions, none but parties and privies who have an opportunty to be heard are bound by a judgment.—Perkins v. Le Viness, Md., 106 Atl. 705.

58.——Res Judicata.—The doctrine of res judicata does not extend to anything but what was directly and expressly passed upon in a former adjudication.—Reading Co. v. Spink, Pa., 106 Atl. 728.

59. **Landlord and Tenant**—Renewal of Lease. —Where a lease was renewed from time to time for yearly periods, the tenancy, prior to close of the last year agreed upon, was one for years, and not from year to year.—Mayo v. Claflin, Vt., 106 Atl. 653.

60.——Unlawful Detainer.—A lessor may maintain an action of unlawful detainer against an assignee of the lease.—Sheridan v. O. E. Doherty, Inc., Wash., 181 Pac. 16.

61.——Waiver of Forfeiture.—Acceptance of rent for the defaulted period, or any part of it, in a lease, is a waiver of the right to declare a forfeiture.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., Ky., 212 S. W. 110.

62. **Larceny** — Trespass. — In larceny there must be a trespass, and a trespass is a wrong to the possession.—Weldon v. State, Ala., 81 So. 846.

63. **Life Estates**—Tenant.—A life tenant is bound to preserve the property and to keep it up so long as the particular estate continues, including the payment of taxes.—May v. Chesapeake & O. Ry. Co., Ky., 212 S. W. 131.

64. **Malicious Prosecution**—Public Policy.—Public policy favors prosecution for crimes, and requires the protection of one who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge.—McNair v. Erwin, W. Va., 99 S. E. 454.

65. **Marriage**—Annulment.—The fraud for which a court of equity will annul a marriage must be extraordinary, of an extreme kind, and with respect to an essential of the contract, and relief will not be granted where an annulment for existing fraud would be against good policy, sound morality, and the peculiar nature of the marriage relation.—Davis v. Davis, N. J., 106 Atl. 644.

66. **Master and Servant**—Contributory Negligence.—Instruction in case of a servant injured in pushing with his hand a wedge under a block of stone that he was guilty of contributory negligence if he, though ordered by the foreman to do so, did so appreciating the danger and having time to consider, when he was face to face with a situation that would make a reasonably prudent man disobey the order, and, in spite of the dangers known to him and apparent, omits a material element, under the Pennsylvania decisions, that the servant given positive orders to go on with the work, under perilous circumstances, may recover for injuries if the work was not inevitably and imminently dangerous.—Fillippon v. Albion Vein Slate Co., U. S. S. C., 39 S. Ct. 435.

67.——Course of Employment.—An employe may be said to receive an injury by accident arising in the course of his employment, within the Workmen's Compensation Act, when it occurs within the period of the employment, at a place where he may reasonably be, and while he is doing something reasonably connected with his employment.—Nordyke & Marmon Co. v. Swift, Ind., 123 N. E. 449.

68.——Independent Contractor.—Where an employe of independent contractors is injured by the collapse of a building constructed according to plans alleged to be defective, the employe's right of recovery against the owner is not to be viewed in the same light as if hired by him.—Looker v. Gulf Coast Fair, Ala., 81 So. 832.

69.——Medical Attention.—Employer having duty of furnishing employe with medical attention, or undertaking to discharge that duty, is not liable for physician's negligence or lack of

skill, but only for failure to exercise ordinary care to select a physician with requisite skill and learning who will give employe the treatment and attention which the case requires.—Smith v. Buckeye Cotton Oil Co., Ark., 212 S. W. 88.

70.——Safe Working Place.—The master's duty to furnish a reasonably safe working place requires him to take proper precautions to guard against dangers which ordinary sagacity and foresight ought to anticipate as likely to attend performance of work, but does not require him to guard against unforeseeable dangers.—Larson v. Duluth, M. & N. Ry. Co., Minn., 172 N. W. 762.

71. **Monopolies**—Resales.—The Sherman Anti-Trust Act is intended to prohibit monopolies and combinations, which probably would interfere with the free exercise of their rights by those engaged, or who wish to engage in trade; but in the absence of any purpose to create or maintain a monopoly a manufacturer engaged in private business may exercise his discretion as to parties with whom he will deal, and may refuse to sell to those who will not maintain specified resale prices.—United States v. Colgate & Co., U. S. S. C., 39 S. Ct. 465.

72.——Restraint of Trade.—A by-law of a corporation, that "a member of the corporation selling his produce to any person other than the regularly authorized agent of the corporation, shall pay 3 per cent. of his gross sales into the treasury of the corporation," is unenforceable, being in restraint of trade.—Baldwin County Producers' Corporation v. Frishkorn, Ala., 81 So. 862.

73. **Mortgages**—Equity of Redemption.—The equity of redemption remaining in the mortgagor of land or of chattels is a property interest.—Zimmern v. Peoples Bank of Mobile, Ala., 81 So. 811.

74.——Straw Mortgagee.—A mortgagor may make a mortgage in favor of a nominal or straw mortgagee, and himself negotiate the note secured by the mortgage.—Commercial Germania Trust & Savings Bank v. White, La., 81 So. 753.

75. **Nuisance** — Statute of Limitations. — Where the proprietor of a portable lunch wagon under license from the city obstructed at night the street in front of leased restaurant premises for more than four years, thus committing a public nuisance, the owner of the premises was not barred from injunctive relief either by the statute of limitations or by laches; the nuisance having been continuing and committed daily, and no right arising from prescription.—Strong v. Sullivan, Cal., 181 Pac. 59.

76. **Partnership** — Interest of Partner. — The real ownership of all the chattels is vested in the firm, and the interest of each partner is merely a right to share in the profits of the business during its continuance, or in a division of property upon its dissolution after all the partnership obligations have been satisfied.—R. A. Myles & Co. v. A. D. Davis Packing Co., Ala., 81 So. 863.

77. **Payment**—Place of.—Without an agreement to the contrary, the place of the creditor's residence is the place of payment of a debt, and it is the duty of the debtor to seek his creditor and make payment to him.—Jones v. Main Island Creek Coal Co., W. Va., 99 S. E. 462.

78. **Principal and Agent**—Duty to Principal. —All profits made and advantage gained by an agent in the execution of the agency belong to the principal, whether the result of the performance or of the violation of a duty of the agency, if the fruit of the agency.—Pederson v. Johnson, Wis., 172 N. W. 723.

79.——Special Agent.—One dealing with a special agent whose authority is confined to a single transaction or a particular act must ascertain the extent of his authority and contract accordingly before the contract will be binding upon the principal.—Grant v. Burrows, Ark., 212 S. W. 95.

80. **Principal and Surety** — Guarantor. — A "surety" undertakes to do that which his principal is bound to do, in case the principal fails to comply with the contract, while a guarantor undertakes that the principal will do the things mentioned in the contract by the principal to be done, and, in case the principal fails to do so, that he, the guarantor, will pay damages sustained to the beneficiary from such failure of the principal.—Hess v. J. R. Watkins Medical Co., Ind., 123 N. E. 440.

81.——Misrepresentation. — Misrepresentations by the obligee in a fidelity bond as to matters which increase the risk of loss, even if made without intent to deceive, avoid the bond.—W. A. Thomas Co. v. National Surety Co., Minn., 172 N. W. 697.

82. **Reformation of Instruments**—Mistake.—The instances in which equity may lend its aid to correct mistakes are where the mistake is mutual, where only one of the parties is under mistake which has been occasioned by the fraud, deceit, or imposition of the other, where one party is under mistake not due to the fault of other party, and where only one party is under mistake which has occurred solely because of negligence of the party seeking relief.—New York Life Ins. Co. v. Kimball, Vt., 106 Atl. 676.

83.——Mutual Mistake.—A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.—Barnett v. Kunkle, U. S. C. C. A., 256 Fed. 644.

84. **Release**—Mistake as to Injury.—That injured person was mistaken as to extent of injuries does not invalidate release, in absence of proof of actual fraud in procuring release. —Colorado Springs & I. Ry. Co. v. Huntling, Col., 181 Pac. 129.

85.——Recitals.—An employer's release of claim for injuries construed as a mere recital of a specific sum and not contractual in the legal sense so as to deprive him of his right to show want of consideration.—Slinkard v. Lamb Const. Co., Mo., 212 S. W. 61.

86. **Remainders**—Statute of Limitations.—The statute of limitations does not begin to run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely.—Mohr v. Harder, Neb., 172 N. W. 753.

87. **Vendor and Purchaser**—Option.—If purchaser under option contract making time of the essence fails to make payments within time therein specified, or within time to which contract has been definitely extended, his contract rights expire, and owner of property need not accept the final payment or give a deed.—Virginia Mining Co. v. Haeder, Idaho, 181 Pac. 141.

88.——Registration.—To destroy the title of a purchaser for value, acquired by prior registry, it is essential that he should have had notice of a prior subsisting outstanding title.—Dix v. Wilkinson, Ga., 99 S. E. 437.

89. **Waters and Water Courses**—Percolation. —Percolating waters developed artificially by excavations and other artificial means belong to the owner of the land upon which they are developed, and are not waters of the state, and cannot be appropriated, under Const. art. 8, §§ 1 and 2.—Hunt v. City of Laramie, Wyo., 181 Pac. 137.

90. **Wills**—Declarations of Testator.—Declarations of a deceased testator are competent evidence to prove contents of a lost will.—Glockner v. Glockner, Pa., 106 Atl. 731.

91.——Execution.—A testatrix need not sign in presence of subscribing witnesses, provided she afterwards acknowledges will and her signature before them.—In re Deyton's Will, N. C., 99 S. E. 424.

92.——Joint Wills.—Though two or more persons may jointly execute a single testamentary document, the instrument is the separate will of each.—Hill v. Godwin, Miss., 81 So. 790.

93.——Partial Intestacy.—A construction resulting in a partial intestacy will be avoided, unless the language of the will is such as to compel it.—Hardy v. Smith, Ind., 123 N. E. 438.

94.——Undue Influence.—On contest of a will for undue influence, testimony as to what occurred at testator's home six years before the time of trial held properly excluded as remote. —Old Colony Trust Co. v. Di Cola, Mass., 123 N. E. 454.